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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TERM 1985

JAMES RAYMOND RUSSELL,

Petitioner,

vs.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTION PRESENTED FOR REVIEW

Whether an accused's inability to cross-examine an ill witness is consistent with the Sixth Amendment right to confront witnesses?

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JAMES RAYMOND RUSSELL,

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OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is its August 1, 1985 Order denying petitioner's Petition for Rehearing The Colorado Supreme Court denied Certiorari on November 12, 1985. Its Order is included within the Appendix.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1254(1): certiorari jurisdiction.

CONSTITUTIONAL PROVISIONS AND STATUTES

In all criminal prosecutions, the accused shall enjoy the right...to be confronted with the witnesses against him... *United States Constitution Amendment VI.*

STATEMENT OF THE CASE

Petitioner, James Raymond Russell, was convicted of violating the Colorado "valuable articles" statute, § 18-16-108, C.R.S. This state statute makes it a crime to provide false information in a "declaration of ownership form" in connection with the sales of valuable articles such as jewelry or coins. *See* § 18-16-101, *et seq.*, C.R.S. The prosecution arose out of the following circumstances.

In October of 1982, petitioner went to Shaw Jewelers in Denver, seeking an opinion concerning the value of an emerald-cut diamond ring. Petitioner testified that he had acquired the ring from an acquaintance as collateral for a loan, and had become the owner of the ring when the loan was not repaid according to its terms.

Shaw Jewelers bought the ring from petitioner several days later. At that time, a representative of Shaw filled out a "valuable articles certificate", which is a sworn statement required by state law. This certificate included a "declaration of ownership", which included statements concerning how long the article had been owned by the seller, here the petitioner. The form was supposed to be filled out by the customer, but in this case was filled out by Shaw. The Shaw employee indicated that the ring had been owned by petitioner for five years. It was this claimed representation that formed the basis for the prosecution.

The principal factual dispute was what, if anything, James Russell told representatives of Shaw Jewelry about the acquisition of the ring, and its ownership by him. Petitioner testified that he advised Shaw Jewelers how he obtained the ring. This included telling them that the prior owner had advised petitioner that the ring had belonged to his grandmother, and that it had been in his family for at least five years. Petitioner testified that the statement on the declaration that he had owned the ring for "five years" was apparently based on what he told Shaw Jewelers concerning the circustances of his acquisition of the ring.

Shaw personnel insisted that James Russell had claimed to have owned the ring for five years, although it was conceded that petitioner did not physically write in that information. It was in fact undisputed that all the writing on the declaration was that of Shaw personnel, not petitioner. Petitioner testified that he was not given a chance to read the declaration before he signed it, and that he did not realize he would be committing a crime by signing the document with the erroneous information included within it. He also testified that he was told that the form was "just for the record" and that "it really didn't matter".

The ring was sold by petitioner, and purchased by Shaw Jewelry, only after the Denver Police Department had been contacted. The police indicated that they had no record that the ring was lost or stolen. Several days later, however, Shaw Jewelry was advised by the police department that the ring was in fact stolen. Petitioner, who had provided Shaw Jewelry with all of his proper identification, including his driver's license, and phone number, was subsequently arrested.

ARGUMENT

PETITIONER WAS DENIED HIS SIXTH AMENDMENT RIGHT TO CONFRONTATION WHEN A KEY WITNESS' ILLNESS MADE IT IMPOSSIBLE TO CROSS EXAMINE HIM

Just before trial, the defense was notified by the prosecution that Al Rubin, an endorsed prosecution witness who was the primary owner of Shaw Jewelry, was too ill to testify. The prosecutor represented to the court that Rubin had "recently suffered two heart attacks and one month ago had had triple by-pass heart surgery."

Despite this, however, Rubin was in fact suddenly called by the prosecution in the midst of trial. Defense counsel objected, advising the court that cross-examination would not be possible unless it was demonstrated that the witness' health would permit vigorous cross-examination.

The trial court then questioned Rubin in the absence of the jury, ascertaining that Rubin had suffered two prior heart attacks, and had had a triple by-pass surgery. The trial court also learned that Rubin was suffering from phlebitis, and had been hospitalized for a fortnight only a month before trial.

Rubin advised the court that his physician had told him not to testify, and that he did not know how testifying would affect his health, stating that "if I pass out you will just have to do something about it." Al Rubin also admitted that he had "a pill under my tongue" at the very time he was being questioned by the court as to the state of his health.

Defense counsel also stated for the record, without contradiction, that Rubin was "grey-like" in appearance and that his "breathing was labored." Further questioning by the court likewise revealed the witness' heart was "going pretty fast", and that he had felt as though he was passing our during the preceding weeks.

The trial court refused a proposed continuance, however, and permitted the prosecution to examine Rubin despite the absence of meaningful opportunity for cross-examination by defense counsel. In so doing, the court in fact stated that, in its opinion, the inability of the defense to examine could "be of course grounds for reversal".

Al Rubin was thereafter permitted to testify. He detailed for the jury his version of what had transpired with petitioner, including damaging testimony that petitioner had told him that petitioner's grandmother had left the ring to him five years before, as opposed to advising Shaw that the ring had been obtained through the default on a loan. The examination conducted by defense counsel was limited solely to very brief questioning about his physical condition. The witness survived this limited examination.

This Petition for Writ of Certiorari presents an issue of first impression. For obvious reasons, trial courts do not often require a sick witness to testify, thereby necessitating either cross-examination of an ill person by a defense lawyer, which would be strategic suicide during the jury trial, or requiring a defendant to forego cross-examination of a witness presenting evidence against him. *State v. Gardner,* 269 S.C. 698, 239 S.E.2d (1977), is the only case counsel for petitioner has found speaking specifically on this issue. In *State v. Gardner,* a prosecution witness became incoherent during cross-examination, and was removed from the courtroom. The defense motion for mistrial was denied. The appellate court held that defense counsel's inability to meaningfully cross-examine the witness rendered the witness' testimony incompetent.

The consequence of permitting Al Rubin to testify in this case was to preclude petitioner from meaningful confrontation of a critical prosecution witness. Although this was a state prosecution, the same right of confrontation applies. *Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968); *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The right of confrontation inherently includes the right at trial to cross-examine witnesses, to permit the jury to probe adequately the credibility of witnesses. *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

Petitioner recognizes that the right of confrontation is not an absolute right, but it is well-established that any significant dimunition of the right to confrontation puts into doubt the integrity of the trial. *Chambers v. Mississippi,* 14 U.S. 284, 93 S. Ct. 1038, 35 L.Ed.2d 97 (1973). Violation of the right of confrontation requires reversal. *Chipman v. Mercer,* 628, F.2d 528 (9th Cir. 1980).

Although Al Rubin was physically present, his physical condition precluded fair cross-examination by the defense attorney. The petitioner's attorney was placed between a rock and a hard place. Cross-examination of an ill witness would certainly have inured to the detriment of petitioner; failing to cross-examine the witness violated the defendant's right to meaningful cross-examination, and hence, of the right to confrontation.

The right to confrontation can be violated even though a witness is physically present and can be subjected to at least some examination. *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). *See also Dorsey v. Warden,* 523 F.2d 590 (6th Cir. 1975). This is so because an accused is entitled to a personal examination of the witness, and this envisions an opportunity not just to test the recollection or conscience of the witness, but also to force the witness to face the jury under examination so as to gauge the witness' credibility. *Ohio v. Roberts,* 448 U.S. 56, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980). Thus, the right of confrontation is denied even though some cross-examination was possible. *See United States v. Miranda,* 510, F.2d 385 (9th Cir. 1975); *United States v. Jordan* 466 F.2d 99 (4th Cir. 1972).

The inability to meaningfully cross-examine an ill witness is analogous to the situation where a prosecution witness refuses to answer some questions, on the grounds of self-incrimination. *See United States v. Cardillo,* 316 F.2d 606 (2d Cir. 1963), *cert. denied,* 397 U.S. 938, 90 S.Ct. 949, 25 L.Ed.2d 119; *Fountain v. United States,* 384 F.2d 624 (5th Cir. 1967); *United States v. Newman,* 490 F.2d 139 (3d Cir. 1974); *United States v. Smith,* 342 F.2d 525 (4th Cir. 1965). *See generally Smith v. Illinois,* 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968).

To be consistent with the Constitutional right of confrontation, an accused must be permitted to undertake some meaningful cross-examination of prosecution witnesses. *Springer v. United States,* 388 A.2d 846 (D.C. App. 1978). The issue is whether the jury could, on the basis of the information before it, adequately appraise the possible bias and motivation of the witness. *United States v. Bennett,* 702 F.2d 833 (9th Cir. 1983). *See also United States v. DeLuca,* 692 F.2d 1277 (9th Cir. 1982); *United States v. Willis,* 647 F.2d 54 (9th Cir. 1984).

Manifestly, the testimony of Al Rubin was detrimental to the defendant, inasmuch as it directly contradicted his testimony as to the disclosures made to Shaw Jewelry. The denial of meaningful cross-examination deprived him his constitutional right to confront the witnesses against him. He need show no specific prejudice to warrant reversal. *Smith v. Ilinois, supra. See also, Brookhart v. Janis,* 384 U.S. 1, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1968). Thus, although clearly petitioner was prejudiced herein, such a showing is not necessary to warrant reversal.

Although good or bad faith on the part of prosecution is "not controlling," *see Frazier v. Cupp,* 394 U.S. 731, 89 S.Ct. 1420, 22 L.Ed.2d 684 (1969), nevertheless, the prosecutor must make a good-faith effort to obtain the meaningful presence of a prosecution witness. *Ohio v. Roberts, supra. See also, United States v. Rothbart,* 653 F.2d 462 (10th Cir. 1981). Although the prosecution is not chargeable with Rubin's illness, nevertheless the circumstances in this case make clear the prosecutor's strategic decision to utilize the witness' illness to unfair advantage. This denied petitioner a fair trial.

The right of confrontation devolves around meaningful cross-examination. Where an accused is precluded from effective cross-examination, whether it be the invocation of the Fifth Amendment, death, unavailability, or illness, the accused's rights are sacrificed just the same, as the opportunity for confrontation of the witness is denied. *See United States v. Cardillo, supra.* Deprivation of the right of cross-examination is not consistent with due process. Petitioner would pray that this Honorable Court would issue its Writ of Certiorari and to review his conviction, which conviction was unconstitutionally procured.

Respectfully submitted,
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JAMES RAYMOND RUSSELL

Case No. 83CA1105

Colorado Court of Appeals

PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

JAMES RAYMOND RUSSELL,

Defendant-Appellant.

Appeal from the District Court of the City and County of Denver

Honorable Robert P. Fullerton, Judge

DIVISION III

Opinion by JUDGE VAN CISE
JUDGMENT AFFIRMED

Tursi and Babcock, JJ., concur

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In a jury trial, defendant, James Raymond Russell, was acquitted of theft by receiving and was found guilty of giving false information on a declaration of ownership form. *See §§18-16-105 and 18-16-108, C.R.S. (1984 Cum. Supp.).* He appeals the judgement of conviction entered on the jury verdict. We affirm.

I.

Defendant first contends that the trial court erred in denying his challenge for cause of a prospective juror who was a high school acquaintance of the chief prosecution witness. We disagree.

"The trial court need not grant a challenge for cause if 'it is satisfied, from an examination of the juror, or from other evidence, that he will render an impartial verdict according to the law and the evidence submitted to the jury at the trial' . . (T)he ultimate decision is one for the trial court's sound discretion, since the factors of credibility and appearance which are determinative of bias are best observed at the trial court level." *Nailor v. People,* 200 Colo. 30, 612 P.2d 79 (1980).

The prospective juror was questioned by the trial court, the prosecuting attorney, and defense counsel about whether his friendship with the witness would influence him. He steadfastly assured them he could remain impartial. Therefore, the denial of the challenge for cause is clearly supported by the record, and there was no abuse of discretion.

II.

Defendant next contends that the trial court erred in denying his motions for mistrial when the People, during voir dire and in questioning the victim, implied that the defendant was involved in a burglary. We do not agree.

Defendant contends that he was prejudiced by the People's questioning. However, because defendant was found not guilty of theft by receiving, the question of prejudice is rendered moot. Error may be rendered harmless and therefore not reversible by the result of the case. *Walker v. People,* 175 Colo. 173, 489 P.2d 584 (1971). And, the implication was unrelated to the charge of giving false information on a declaration of ownership statement. Therefore, it could not have prejudiced the jury in finding against defendant on this charge.

III.

Defendant also contends that the trial court erred in permitting the prosecution to adduce testimony from a witness who defendant believed was too ill to be cross-examined effectively. Again, we disagree.

The determinaiton of competency is addressed to the discretion of the trial court, and, absent an abuse of discretion, the court's ruling will not be disturbed on review. *People v. Estorga,* 200 Colo. 78, 612 P.2d 520 (1980). The witness voluntarily came to the courtroom to testify. He stated several times that he was well enough to testify and be cross-examined. The trial court found that the witness was well enough to testify, and that finding is supported by competent evidence.

The People were able to examine him without any difficulties. Defense counsel limited his cross-examination to inquiring about the witness' health problems. No offer of proof was made by the defense as to what the witness' testimony would have been had he been cross-examined on the substantive issues.

There was no showing of any abuse of discretion here.

IV.

Lastly, defendant contends that his motion for a mistrial should have been granted when the People referred to defendant's felony record in closing argument. We find no error.

Defendant testified in his own defense. The record shows that, in the prosecutor's closing argument, he prefaced his remarks about defendant's felony record by referring to the factors set forth in the jury instruction on credibility, and that the remarks were only in reference to defendant's credibility. There is no impropriety in comment as to how well and in what manner a witness, including a defendant, measures up to the tests of credibility. *Valdez v. People,* 168 Colo. 429, 451 P.2d 750 (1969).

Judgment affirmed.

JUDGE TURSI and JUDGE BABCOCK concur.

Case No. 83CA1105

IN THE

Court of Appeals

Of The State of Colorado

THE PEOPLE OF THE STATE OF COLORADO,

Plaintiff-Appellee,

v.

ORDER

JAMES RAYMOND RUSSELL,

Defendant-Appellant.

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 9-3-85, provided that if Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Van Cise, J.
Tursi, J.
Babcock, J.

Case No. 85SC321

IN THE

Supreme Court of the United States

Certiorari to the Colorado Court of Appeals; 83CA1105

Denver District Court; 82CR2606

ORDER OF COURT

JAMES RAYMOND RUSSELL,

Petitioner,

v.

PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, NOVEMBER 12, 1985

c c : Gary Sonke, Clerk
Colorado Court of Appeals

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